CHEYENNE AND ARAPAHO TRIBES OF WESTERN OKLAHOMA

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS),

READING & BATES PETROLEUM CO., AND WOODS PETROLEUM CORP. 1/

IBIA 82-37-A Decided February 10, 1983

Appeal from decision of Deputy Assistant Secretary--Indian Affairs (Operations) approving two cooperative unit plans affecting tribal oil and gas leases.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

> Where an appeal raises legal questions, these matters are reviewable by the Board. Insofar as the issues raised involve matters committed solely to the discretion of the Secretary, the Board is bound by the exercise of Secretarial discretion. In this case, the ultimate decision, whether to approve a unit cooperative agreement affecting Indian oil and gas leases, was discretionary. The appeal raises certain legal issues, however, and it is appropriate for the Board to resolve those questions notwithstanding that deference must be given to BIA's discretionary authority.

1/ Previously denominated Cheyenne and Arapaho Tribes of Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations). The names of the corporate parties are added to reflect their participation as parties to the appeal.

APPEARANCES: Anita Remerowski, Esq., for appellant tribes; James C. T. Hardwick, Esq., for Reading & Bates Petroleum Company and Woods Petroleum Corporation. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have sought review of the February 9, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations). That decision affirmed a determination of the Acting Anadarko Area Director (Area Director), Bureau of Indian Affairs (BIA), approving the cooperative unit operation of certain Indian trust land leased by appellants to Reading & Bates Petroleum Company (Reading & Bates) and Woods Petroleum Corporation (Woods) for oil and gas development.

Reading & Bates and Woods entered into oil and gas leases covering restricted Indian land owned by appellants. The first of these leases was approved on May 10, 1976, for sec. 32, T. 14 N., R. 20 W., in Custer County, Oklahoma. A second lease, approved on February 22, 1980, covered the NE 1/4 and SW 1/4 of sec. 29, T. 14 N., R. 20 W., also in Custer County. Each of these leases was for a term of 5 years.

On July 17, 1980, Reading & Bates received pooling orders for these two sections from the Oklahoma Corporation Commission. Drilling operations were commenced in sec. 29 on November 30, 1980, and on sec. 32 on May 6, 1981.

When the earlier of these leases was nearing its expiration date, Reading & Bates and Woods sought to retain the lease through the use of a

communitization agreement. Under such an agreement, drilling operations on any part of the communitized area would be deemed drilling on all of the leaseholds in the area and would therefore extend the term of the leases even though actual drilling had not been conducted on each and every leasehold. Such cooperative unit operation is often required for the orderly and economic development of oil and gas resources.

On April 16, 1981, appellants rejected the proposed communitization agreements. Appellants indicated they wanted a payment of $1,500 per acre for the 960 acres covered by the leases and a 5 percent carried working interest in all of the affected leases. Unless the agreements incorporated these provisions, they would not sign. This position was reiterated in meetings on May 1 and 4, 1981.

On May 5, 1981, pursuant to Departmental procedures, Reading & Bates submitted the communitization agreements to the Geological Survey for approval, indicating that appellants had been notified of the proposed agreements but had refused to sign. Geological Survey recommended approval of the agreements the same day. The agreements were subsequently approved by the Concho Agency on May 6, 1981, and by the Anadarko Area Office on May 8, 1981.

On May 9, 1981, an employee of Reading & Bates informed appellants by telephone that BIA had approved the agreements. On May 11, 1981, representatives of appellants met with the Area Director, the Director of Tribal Governmental Services, and the Field Solicitor of the Anadarko Area Office. The approval of the agreements was discussed at this meeting. Appellants

continued to express their dissatisfaction with the economic terms of the agreements.

Appellants filed a notice of appeal challenging the May 8, 1981, approval of the leases on August 5, 1981. Despite objections from Reading & Bates and Woods that this appeal was not timely filed, the Deputy Assistant Secretary affirmed the Area Director's decision on the merits on February 9, 1982, without discussing the timeliness of the appeal. 2/ Appellants' notice of appeal from this decision was received by the Board on April 12, 1982.

[1] On the record before it, the Board finds the decision to approve the communitization agreements at issue was based partly on the exercise of Secretarial discretion and partly on a legal conclusion. Except as such cases may be specifically referred to it, the Board does not have general jurisdiction to review decisions of the BIA made in the exercise of discretionary authority given to the Secretary by Congress. See 43 CFR 4.330(a)(2). The ultimate decision whether or not to approve a particular communitization agreement is clearly discretionary under 25 U.S.C. § 396d (1976), which states:

2/ Appellees contend that BIA procedural regulations found at 25 CFR 2.4, required dismissal of this appeal as untimely filed. It appears, as appellees contend, that similar rules within the Department have been strictly construed. See Kathleen Face v. Acting Assistant Secretary--Indian Affairs, 11 IBIA 35 (1983); Hamlin v. Area Director, 9 IBIA 16 (1981), Donald Victor Beck v. Bureau of Indian Affairs, 8 IBIA 210; On Reconsideration, 8 IBIA 211 (1980). And see Ilean Landis, 49 IBLA 59 (1980); Northway Natives, Inc., 4 ANCAB 207 (1980); Appeal of Harry Claterbos Co., 10 IBCA 216, 84 I.D. 969 (1977); Royalty Smokeless Coal Co., 9 IBMA 306 (1976). Nonetheless, on the record presented, BIA apparently found notice to appellants to have been defective or time limits for appeal were waived under authority of 25 CFR 1.2. At any rate, the matter was considered and decided on the merits in favor of appellees. Any error, if there be any, is harmless.

> In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

This statute clearly places the approval of a communitization agreement within the discretion of the Secretary. The Board is without jurisdiction to review that decision unless the question is specifically referred to it under 43 CFR 4.330(b). No such referral has been made. Therefore, the Board lacks jurisdiction to review the merits of these particular communitization agreements. 3/

The appeal does, however, raise the legal questions whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases appellants signed when they leased their land to Reading & Bates and Woods constitutes approval of a future communitization agreement. Clause 9 states:

> Unit operation.--The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

3/ Appellants' arguments based on Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982), are not within the Board's jurisdiction to review, notwithstanding the attempt by the dissent to apply the holding in that case to the facts here presented. Had the appellant made a showing that BIA approval was not in the best economic interest of the tribe, as the dissent assumes, and caused thereby a breach of the Department's trust responsibility in a legal matter reviewable by the Board, a different result would be possible. These matters, speculated upon by the other Board members, are not raised by the facts now before the Board.

The Board finds, as did the Deputy Assistant Secretary, that this language constitutes appellants' agreement to abide by any future communitization agreement found by the Secretary or his delegate to be in the best interests of the Indian lessors. In agreeing to the original lease, the appellants also agreed to be bound by the Secretary's determination of whether a communitization arrangement was appropriate. 4/

Therefore, for the reasons discussed above and pursuant to the authority delegated to the Board of Indian Appeals, 43 CFR 4.1, the decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

Franklin D. Arness
Administrative Judge

4/ The Board does not accept appellants' argument that the term "subscribe" in Clause 9 contemplated that their signature on the communitization agreement was required for the agreement to be effective.

CHIEF ADMINISTRATIVE JUDGE HORTON SPECIALLY CONCURRING:

I agree that it was proper for the Deputy Assistant Secretary to uphold the Area Director's approval of the communitization plan in question. I do not agree, however, that the only legal issues presented by this appeal are "whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases * * * constitutes approval of a future communitization agreement" (Opinion, 11 IBIA at 58). 1/

Appellants submit that while the Secretary's authority to approve communitization agreements affecting Indian leases is discretionary under the provisions of 25 U.S.C. § 396d (1976), no exercise of discretion "as required by law and by government obligations as trustee of tribal lands" took place

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1/ There is no question that tribal consent is required for communitization agreements to be effective. The requirement is made plain by 25 CFR 171.21(b) (now codified at 25 CFR 211.21(b)).

As to whether or not Clause 9 of the leases constitutes consent to future communitization agreements approved by the Secretary, the Deputy Assistant Secretary held, without discussion, that the clause provides such consent. The main opinion here repeats this conclusion of law.

Appellants contend that the provisions of Clause 9 are ambiguous, requiring resort to the intentions of all parties as to what is meant by the language. The tribes contend they never intended to commit themselves to future communitization plans without any opportunity to consider the particular plan (appellants' opening brief at 25-30). According to appellants, Clause 9 is nothing more than an unenforceable agreement to agree or negotiate in the future.

Presumably, the Deputy Assistant Secretary regarded Clause 9 as a plain and unambiguous statement that the tribes had consented to future communitization plans where they were approved by the Secretary during the period of supervision. That is how I read Clause 9. Considering the two mining leases in their entirety, including their nature, purpose, and subject matter, the intent of the parties is apparent from the actual words used in Clause 9. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. This rule applies to Indian leases. Whatcom County Park Board v. Bureau of Indian Affairs, 6 IBIA 196 (1977).

in this matter (appellants' reply brief at 6; see also appellants' opening brief at 17-18, 20-23). This contention, based on claims that the BIA gave the proposed communitization "rubber-stamp approval" at the "eleventh hour," raises questions concerning the legal sufficiency of the BIA's actions.

That the Secretary or his delegated representative may not rubberstamp proposed communitization plans affecting Indian lands was firmly answered in Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383, 386 (10th Cir. 1982):

> While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands.

The court concluded in Kenai that the BIA has an obligation as trustee to ensure that communitization plans are in the Indians' best interest, including a determination that plans are economically satisfactory to Indians. Id. at 387.

Because of the jurisdictional limitation which precludes the Board from reviewing discretionary decisions of the BIA, it is correctly noted in the main opinion that it would not be proper for the Board to substitute its judgment for the agency's as to whether a given plan is in the Indians' best interest, economically or otherwise. It is clearly within our jurisdiction, however, to determine whether legally required standards controlling the agency's exercise of discretion in communitization disputes were followed. If legally required standards are found to have been ignored, it would be

incumbent upon the Board to remand the matter to the agency for appropriate action. Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982).

The burden of proof is on appellants to show that agency action complained of was legally deficient. Hazel Hawk Visser v. Bureau of Indian Affairs, 7 IBIA 22 (1978). Accepting the holding in Kenai as controlling law in the case before us, this means appellants must show that BIA's communitization approval was not in the tribes' best economic interest. This appellants failed to do. Nor does the record as constituted support appellants' allegation that the BIA rubberstamped its approval of recommendations submitted by the Geological Survey. While it appears the case that the Concho Agency approved the agreements on the same day they were approved by the Geological Survey, and that subsequent approval by the Anadarko Area Office occurred within 48 hours, these facts, standing alone, do not prove that the BIA failed to evaluate the communitization plan from the standpoint of what was best for the tribes. It is obvious from the record that although formal BIA approvals were obtained very near the expiration time for one of the leases, all parties had vigorously discussed communitization agreements reasonably in advance of any lease termination. Under the circumstances, it was perhaps not difficult for officials accustomed to such matters to evaluate a Geological Survey recommendation on an expedited basis. 2/

2/ Following the Kenai decision, the BIA adopted guidelines relating to the approval of communitization agreements which, among other things, encourage lessees of Indian lands to submit proposed plans to the BIA not less than 90 days prior to the expiration date of the first Indian lease in the proposed unit. The guidelines require that Superintendents and Area Directors prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement and its long term effects are in the best interests of the Indian lessor (see appellants' opening brief, Appendix 16).

Appellants' contention that the BIA routinely approves any communitization plan presented by the Geological Survey is not persuasive. The very matter at issue in Kenai was the BIA's disapproval of a communitization agreement which the agency concluded was not in the Indian lessor's best economic interest.

For the additional reasons given, I specially concur that the decision appealed from be affirmed.

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT CONCURRING IN PART AND DISSENTING IN PART:

The factual and legal issues involved in the appeal presently before the Board are identical to those examined by the Tenth Circuit Court of Appeals in Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982). The analysis and reasoning of the circuit court in that case, therefore, are directly applicable to the case at bar. Consequently, application of the Kenai holding necessitates my concurring in part and my dissenting in part from the decision of my colleagues.

I agree that appellee's motion for dismissal on grounds of untimeliness should be denied and that the Board has jurisdiction to review the legal sufficiency of the BIA's decision to approve these communitization agreements, though not the substantive content of that decision. Furthermore, I agree that the statutory and regulatory scheme regarding the communitization of oil and gas leases on Indian trust lands was correctly followed in this instance and that Clause 9 of this lease constitutes the tribe's prior consent to a reasonable communitization agreement approved by the Secretary.

I respectfully dissent from my colleagues, however, with regard to whether or not the Federal trust responsibility to the Indian lessors was fulfilled in this case. In light of Kenai, I would remand this case to the Bureau for action consistent with that decision, and with the specific communitization guidelines and general policy pronouncement regarding approval of communitization agreements issued in response to Kenai by the Deputy Assistant Secretary-Indian Affairs (Operations) and published in the Federal Register.

As does the case before us, Kenai involved a challenge to the exercise of the Secretary's authority to approve a communitization agreement of oil and gas leases on Indian trust lands. After quoting 25 U.S.C. § 396d (1976) and 25 CFR 171.21(b) (now 25 CFR 211.21(b)), the court explained:

> While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands. Pursuant to the trust responsibilities of the United States, the Department of the Interior is charged with the administration and supervision of oil and gas leases on restricted tribal lands. 25 U.S.C. §§ 396a-396f. Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. Gray v. Johnson, 395 F.2d 533, 536 (10th Cir.), cert. denied, 392 U.S. 906, 88 S.Ct. 2056, 20 L.Ed.2d 1364 (1968).
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> * * * In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests. The Superintendent has no obligation to approve a plan which does not serve the Indians' best interests and he has acted within his discretion in refusing to approve an economically unsatisfactory plan. [Emphasis added.]

671 F.2d at 386, 387. Kenai, thus, clearly establishes that although the authority to approve or disapprove communitization agreements is discretionary, its exercise must be within the legal framework of the trust responsibility owed by the United States Government to the Indian tribes and people.

The Deputy Assistant Secretary responded to the Kenai decision by issuing to all BIA area directors a memorandum, dated April 23, 1982, setting

forth guidelines for the approval of communitization agreements. The memorandum stated:

> [T]he recent decision of the 10th Circuit Court of Appeals in Kenai * * * provides us with some guidance on the scope of * * * [BIA's] authority [to approve communitization agreements of Indian oil and gas leases]. Therefore, the following guidelines have been developed to assist Area Directors and Superintendents in exercising this authority.
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> 2. The Secretary has the discretion to approve or disapprove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor. Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:
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> a) The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.
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> b) The Minerals Management Service is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation.
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> c) The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease.
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> d) Central Office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.
>
> e) Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action. * * *

f) The party applying for approval of a Communitization Agreement may be requested to provide copies of farm out or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

An announcement of the adoption of these guidelines was published in the Federal Register (47 FR 26920 (June 22, 1982)). The explanatory material appearing in the Federal Register stated:

> It is the intent of the BIA that in exercising the Secretary's discretionary authority to approve or disapprove communitization or unit agreements, BIA officials should take into consideration the Indian owner's best interests and consider all of the factors, including economic considerations, as prescribed by the U.S. Court of Appeals in its decision in Kenai Oil and Gas, Inc. v. Department of the Interior, 671 F.2d 383 (February 17, 1982). In that decision * * * [t]he Court concluded that the Secretary, acting in his capacity as a trustee, has the responsibility to manage Indian lands so as to make them profitable for the Indian and to maximize lease revenues. Accordingly, the new guidelines require that in the future BIA Area Directors and Superintendents must prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement is in the best interests of the Indian lessor. The guidelines also require that the long term effects of the agreement must be in the best interests of the Indian lessor and these effects must be documented.
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> The Bureau is aware that the process of reaching the determinations required by the guidelines will require that Area Directors and Superintendents receive proposed agreements sufficiently in advance of the expiration of the primary term of any Indian lease within the proposed unit in order to conduct an adequate review of the engineering and economic factors involved.
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> Consequently, in order to ensure adequate consideration, lessees of Indian lands are encouraged to submit all future communitization agreements to the appropriate Bureau of Indian Affairs office not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit.

The facts of the present appeal raise a serious question as to whether or not the BIA's approval of the communitization agreements in question comports with the requirements of its trust responsibility as set forth in the

guidelines and policy statement. The BIA's "eleventh hour" approval of the communitization agreements, the summary recommendation by the Concho Agency for approval of the agreements the very day they were approved by Geological Survey, and the subsequent approval by the Anadarko Area Office within the next 48 hours all cast doubt as to whether the BIA exercised its discretionary authority in conformity with its trust responsibility to the Indian lessors as interpreted by both the Tenth Circuit Court and the Department. Few, if any, of the present guidelines for approval of communitization agreements appear to have been followed. Neither the original decision of the Acting Area Director to approve the communitization agreements, nor the affirmance by the Deputy Assistant Secretary adequately considers the Government's trust responsibility. Nor has BIA provided a justification or explanation on appeal. The facts of this case raise reasonable doubt that the BIA's action comports with its recognized and delineated trust responsibility regarding approval of communitization agreements. Therefore this case should be remanded to the BIA for action consistent with its trust responsibility as defined by the Tenth Circuit in Kenai and by the Bureau itself in its guidelines and policy pronouncement.

Such a remand, however, is not only justified by the facts of this case but is required as a matter of course. Although the Kenai decision of February 17, 1982, postdated the decision of the Deputy Assistant Secretary which is the subject of this appeal, this Board is bound by the circuit court opinion and consequently its own decision and disposition must be in accord. Remand then to the Deputy Assistant Secretary with instructions for him to exercise his discretion according to the procedures (e.g., guidelines) and

policies (e.g., Federal Register notice) adopted by the Department in compliance with Kenai is obligatory. 1/

In conclusion I wish to emphasize that on remand the substantive decision to approve or disapprove the communitization agreements would not be at issue. This decision is clearly discretionary. Rather, a remand would merely require that the decision be made within the legal parameters set forth by the court and adopted by the Department. Wesley Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982).

For these reasons, I respectfully dissent from the affirmation of the Deputy Assistant Secretary's approval of the communitization agreements. Under the circumstances of this case, the BIA's actions and decisions, without more, constitute a clear breach of the trust responsibility and fiduciary duty owed the appellant lessors.

Jerry Muskrat
Administrative Judge

1/ As this Board observed in a previous decision involving the trust responsibility:

"After the trust responsibility is established, it is appropriate for those departments of the Federal Government charged with executing the trust to determine, initially at least, the specific content of the fiduciary role. * * * However, courts and by analogy the Board, in its quasi-judicial capacity, have the authority to review actions of the trustee * * * and to direct the trustee in regard to the fulfillment of its trust responsibilities. * * * In fact, once the trust responsibility is established, there can be judicial establishment of the standard of care owned by the Government under its fiduciary duty. * * * And, as the Supreme Court has indicated, 'Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts.'"
Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 236-37, 89 I.D. 132, 147 (1982), disapproved, in part, on other grounds in Burnette v. Deputy Assistant Secretary, 10 IBIA 464 (1982) (citations omitted).